

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2001-374

September 10, 2001

PUBLIC UTILITIES COMMISSION  
Re: Proposed Rulemaking to  
Amend Chapter 91

ORDER ADOPTING  
AMENDED RULE

WELCH, Chairman; DIAMOND and NUGENT, Commissioners

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**I. SUMMARY**

In this Order we amend certain provisions of Chapter 91<sup>1</sup> of the Commission's Rules (65-407 CMR 91), Safety of Overhead Utility Lines Crossing Water and Adjacent Areas Suitable for Rigging, Launching, and Operating Boats. This rule establishes safety requirements for overhead utility lines crossing areas of water and adjacent rigging or launching areas where boats may come into contact with overhead lines.

**II. BACKGROUND OF THIS RULEMAKING**

We originally adopted Chapter 91 in 1988 under our general statutory authority to ensure safe, reliable facilities and service found in 35-A M.R.S.A. § 301. Chapter 91 established standards for utility lines crossing navigable bodies of water and rigging or launching areas by incorporating the requirements of the National Electrical Safety Code (NESC or the Code) with some modifications.

In some instances, Chapter 91 requires greater safety measures than the NESC. Subsequently, in 1995, the Legislature statutorily required utilities and cable television companies to operate and maintain all of their lines in conformance with the NESC. 35-A M.R.S.A. § 2305-A. Under the statute, the Commission may modify, delete and waive requirements of the NESC (35-A M.R.S.A. § 2305-A(4)) and may impose additional

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<sup>1</sup> This Rule is currently numbered 91. As part of this rulemaking, we change the number of this rule from 91 to 910 to conform to our current practice of assigning each rule a three-digit number. References to Chapter 91 in this order refer to our existing rule.

safety measures, 35-A M.R.S.A. § 2305-A(5).<sup>2</sup> Any additional safety measures remain in effect for 10 years unless repealed or reaffirmed within 10 years. Modifications, deletions or waivers remain in force until the next edition of the NESC is published and adopted by the Commission, or the changes are repealed by the Commission, whichever occurs first. The Commission must reaffirm the changes or they will expire when the new Code is adopted by the Commission.

A new edition of the Code was published in 1997. By operation of law (35-A M.R.S.A. § 2305-A (3)(B)), the Code was deemed adopted by the Commission. However, due to oversight, the Commission never reaffirmed the modifications and additions to the Code contained in Chapter 91.

We opened this rulemaking by Order issued on July 3, 2001, in order to readopt and update the additional safety measures to the Code contained in our original Chapter 91 in compliance with 35-A M.R.S.A. 2305-A(5). Sections 1(A), 3(A), 3(B) and 3(C) contain additional measures. Once adopted, the additional safety measures will remain in effect unless we repeal the requirements or decide not to reaffirm the requirements within 10 years of their effective date.<sup>3</sup>

On August 7, 2001, we held a hearing on the proposed amendments pursuant to the Administrative Procedures Act, 5 M.R.S.A. § 8052, and 35-A M.R.S.A. § 2305-A(5). The latter section allows the Commission to adopt safety measures in addition to those required by NESC after an appropriate hearing. Representatives of Central Maine Power Company (CMP) and the Telephone Association of Maine (TAM) attended the hearing and subsequently filed brief written comments.

### **III. HISTORY OF CHAPTER 91**

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<sup>2</sup> We read 35-A M.R.S.A. § 2305-A(4), Modifications, Deletions and Waivers to Standard, to describe instances when the Commission allows variances to the Code standards which provide equivalent or lesser levels of safety than the Code provides. Likewise, we read 35-A M.R.S.A. § 2305-A(5), Additional Safety Measures, to describe instances when the Commission creates variances to the Code standards which provide greater levels of safety than the Code provides. These amendments contain only "Additional Safety Measures."

<sup>3</sup> We note that the 2002 Edition of the Code is scheduled for publication in the near future. If no hearing is requested within 120 days of publication of the new Code, the Code will be deemed adopted pursuant to 35-A M.R.S.A § 2305-A(3)(B). Having obtained an advance copy of Section 23, the portion of the Code relating to this Rule, we recognize that the 2002 Edition contains some revisions to Table 232-1 and the applicable footnotes. None of these revisions appears to substantively affect the provisions of our amended Chapter 910. Because the new Code will not become effective until after January 2002, at the earliest, we amend and reaffirm the provisions in Chapter 910 with reference to the 1997 Code.

When the Commission adopted Chapter 91 in 1988, there was no requirement, either in statute or the Commission's rules, that existing overhead lines comply with the water crossing requirements of the National Electric Safety Code. At that time, the Commission was concerned about the danger presented by existing overhead electric and telephone utility lines. Chapter 32, Section II(A)(2) of the Commission's Rules provided that all new construction, reconstructions, maintenance and operation of electric plants comply with the most recent requirements of the National Electric Safety Code. The application of Code standards to existing electric and telephone lines, however, was not addressed. Partly in response to the 1975 electrocution of Phillip Cobb, who died when the 26-foot mast of his Hobie Cat came in contact with an overhead line, the Commission sought to apply the Code requirements to existing overhead lines with some specific modifications. *See generally, Maine Public Utilities Commission, Order Adopting Rule and Statement of Factual and Policy Basis*, Docket No. 88-97. (July 19, 1988). Although 35-A M.R.S.A. § 2305(2) now requires that all transmission and distribution utilities, telephone utilities and cable television companies comply with the most current standards of the Code, we believe that the Chapter 91 modifications, providing additional safety measures, remain necessary.

Chapter 91 incorporated all the requirements of Sections 7 and 8 of Table 232-1 of the 1987 Code, including all applicable footnotes, with at least four modifications. Section 7 sets forth the vertical clearance requirements for wires, conductors and cables crossing over water areas suitable for sailing. Section 8 sets forth the vertical clearance requirements for lines crossing over public or private land and water areas posted for rigging and launching sailboats. The most significant departure from the Code requirements in Chapter 91 was the elimination of Section 7(b) from Table 232-1, which effectively created an additional safety measure.

Section 7 of Table 232-1, describing height requirements for lines crossing water bodies suitable for sailing, is divided into four categories: water areas with an unobstructed surface area of less than 20 acres, areas of 20 to 200 acres, areas of 200 to 2,000 acres and areas of greater than 2,000 acres. Different height requirements apply to each of the four categories. The Commission determined that Section 7(b), 20 to 200 acres, should be eliminated and that the higher height requirements of Section 7(c) (32 feet to 35 feet) should also apply to water areas of 20 to 200 acres. This determination was based on findings that sailboats with masts exceeding 29 feet were being used on water areas of 20 to 200 acres with accidents resulting.<sup>4</sup> The 1997 Edition of the Code (currently in effect) continues to provide different requirements for the four categories of water areas, making the elimination of Section 7(b) still necessary to give effect to the original purpose of Chapter 91.

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<sup>4</sup> These findings were made by representatives of four New England electric utilities who recommended increasing vertical height requirements of lines crossing 20 to 200 acre bodies of water and were contained in the *Preprint Proposals for Revision of the 1987 Edition of the Code for the 1990 Edition* (Institute of Electrical and Electronics Engineers, Inc. New York, NY, April 15, 1988). The Code Subcommittee ultimately rejected the proposal based on insufficient data. Docket No. 88-97, *Order* at 3.

Through Chapter 91, the Commission also made the requirements of Section 8 of Table 232-1 applicable to existing overhead lines. Section 8, describing the vertical height requirements for overhead lines crossing public or private land and water areas posted for rigging or launching sailboats, simply requires that clearance for those areas should be five feet greater than those in Section 7. Although the 1988 *Order Adopting Rule* and Chapter 91 do not explicitly address the elimination of category 7(b) in reference to Section 8, by its own terms Section 8 relies on Section 7. Moreover, it is apparent from the discussion in the *Order Adopting Rule* that the Commission intended to eliminate the 20 to 200 acre category for the purposes of Section 8 as well as Section 7. The Commission did explicitly eliminate the 20 to 200 acre category of Footnote 18 to Table 232-1, indicating a desire to remove the category throughout the portion of the Code incorporated by the Rule.

Significantly, the Commission also provided a broader definition of “areas posted for rigging or launching sailboats” in Chapter 91 than the definition provided by the 1987 Edition of the Code. Basing its definition on a definition formerly permitted by the 1984 Edition of the Code, the Commission clarified that “posting” in Chapter 91 would mean “posting by signs, launching ramps, or other special facilities or land improvements or use which indicates that the area is intended for such use” rather than by signs only. Docket No. 88-97, *Order* at 6. The 1997 Edition of the Code is silent on the definition of “areas posted for rigging and launching sailboats.” Maintaining the broader definition originally provided in Chapter 91 does impose an additional safety measure beyond what the current Code requires.

Recognizing the burden heightened requirements placed on some utilities, the Commission provided a limited exception for lower voltage lines. The Commission allowed telephone utilities to maintain existing communication conductors and cables on existing poles, and electric utilities to maintain existing neutral conductors that met the requirements of Rule 230 E(1) of the 1987 Code until the poles are replaced, removed or reconstructed at which time the lines must meet the requirements of the Rule. The Commission found that these lines presented a lower risk and were therefore a lower priority. Docket No. 88-97, *Order* at 4.

Also in consideration of that burden, the Commission provided a two-year grace period for compliance with the Rule. Utilities were required to promptly file a list of non-complying lines and a plan to bring them into compliance before the two-year deadline expired on July 1, 1990. Lines that crossed land areas posted for rigging or launching boats that did not comply with the Rule were required to either be wrapped in protective coverings or marked with warning devices until the lines were raised. As described below, these grandfathering provisions are no longer necessary.

Chapter 91 also specifically modified the Code in reference to Footnote 19 to Table 232-1. Footnote 19 to Table 232-1 provided and currently provides that “where the US Army Corps of Engineers, or the state, or surrogate thereof has issued a crossing permit, clearances of that permit shall govern.” *National Electrical Safety*

Code, Footnote 19 to Table 232-1 at 79 (CS-1997). The Commission took the opposite approach, and provided in Chapter 91 that “the requirements of Chapter 91 shall supersede any requirements for less vertical clearance allowed by the State of Maine, or a surrogate thereof, or the U.S. Army Corps of Engineers, to the extent allowed by law.” Chapter 91, § II(a)(iv).

#### IV. DISCUSSION OF AMENDMENTS TO INDIVIDUAL SECTIONS

We adopt all the changes we proposed in our Order Commencing Rulemaking with one editorial correction suggested by CMP. CMP notes that all references should be to the National Electrical (as opposed to Electric) Safety Code. We have made that change. CMP also asked that the Commission make clear that any exemptions granted by the Commission under Chapter 91, § VI would remain in effect after the amendments are adopted. We agree with CMP that nothing in these amendments is intended to change any waiver currently in existence. All waivers remain in effect, as do any terms or conditions associated with those waivers.

CMP also commented during the rulemaking hearing that it would explore proposing language that would exempt certain rivers that would not have sailboat traffic but that meet the excess of 20 acres definition. CMP in its written comments states that after examining this issue further, it is no longer pursuing this request.

TAM’s only comment was that it concurred with CMP’s comments.

##### A. Section I: Definitions

Chapter 910 includes revisions to both the terms selected for definition and the definitions provided in several instances.

##### 1. Section 1(B): Aerial Utility

We add the term “aerial utility” and define it to include distribution and transmission utilities, telephone utilities and cable television companies. The addition of this term allows these three entities to be referred to with one term throughout the Rule.

##### 2. Section 1(C): Transmission and Distribution Utility

We replace the term “electric utility” with “transmission and distribution utility” to reflect the recent restructuring of the electric industry and for consistency with terms currently used in Title 35-A.

##### 3. Section 1(D): Telephone Utility

We eliminate the reference to the definition of “radio common carriers” in Section I(A) of Chapter 24 of the Commission’s Rules as current Chapter

240 contains no Section I(A) or reference to radio common carriers. We also replace references to “cellular service providers” with “mobile telecommunications services” to reflect the terms currently in use and defined in Title 35-A and define it with reference to 35-A M.R.S.A. § 102(9-A).

4. Section 1(E): Cable Television Company

We define “cable television company” with reference to 30-A M.R.S.A. § 2001 as reflected in 35-A M.R.S.A. § 2305-A(1)(A).

5. Section 1(F): National Electrical Safety Code

We replace “National Electrical Safety Code, 1987 Edition” with “National Electrical Safety Code” and expand the definition to include the 1997 Edition and any newer editions in effect pursuant to 35-A M.R.S.A. § 2305-A, which allows more current versions of the Code to automatically become effective unless contested. A statement indicating where copies of the incorporated provisions of the Code may be obtained is included.

6. Miscellaneous

We change references to “Technical Analysis” to “the Director of the Technical Analysis Division of the Commission” or “the Director” in order to refer to the Director and eliminate the definition of “Technical Analysis.”

The definition of “warning device” is no longer necessary as we eliminate Section III of Chapter 91. This section required the use of warning devices on lines crossing land areas posted for rigging and launching sailboats that did not immediately meet the requirements of the Rule. Because the July 11, 1990 deadline has expired, all lines that would have used warning devices as a substitute for immediate compliance should now be in compliance, rendering the term and all sections requiring warning devices unnecessary.

We replace the word “sailboating” with “sailing” throughout the Rule since “sailboating” is not a word recognized by Webster’s II New Riverside University Dictionary. (Webster’s II New Riverside University Dictionary, 1031 (1988).

B. Section 2: Purpose

We add a new Section 2, describing the purpose of the Rule. In addition, portions of current Section 3, Warning Devices, are incorporated into this section.

C. Section 3: Vertical Clearance Requirements

Section 3, currently Section II of Chapter 91, is the operative provision of the Rule. Together with 35-A M.R.S.A. § 2305-A, Section 3 makes all the National

Electrical Safety Code vertical clearance requirements contained in Sections 7 and 8 of Table 232-1 applicable to overhead utility lines crossing water bodies and rigging or launching areas with the exception of the modifications outlined in the remainder of Section 3. We retain the language from Section II in full with the exception of the July 1, 1990 deadline, which is struck as it is no longer relevant. Likewise, we eliminate Section II(b) entirely. This section sets forth a requirement that utilities file a list of non-compliant lines crossing water areas and rigging or launching sites by September 1, 1988 and file a plan for full compliance by July 1, 1990. Since both these deadlines have long since passed, Section II(b) is no longer necessary.

1. § 3(A) – Water Areas of 20 to 2,000 Acres

We add a new sub-heading, “Water Areas of 20 to 2,000 Acres” to emphasize that this section contains the Rule’s major substantive addition to the Code and to identify the portions of Section 3 that relate to this category of water bodies. The three subsections in Section 3(A) all reflect modifications we make to Table 232-1 of the Code which create additional safety measures.

a. § 3(A)(1)

We revise current Section II(a)(i) of Chapter 91 to reflect current Code standards. Specifically, we replace “minimum clearance requirements of 32 feet to 35 feet” in Section II(a)(i) with “minimum clearance requirements of 31.5 feet to 34.5 feet” when describing the minimum clearance requirements of Section 7(c) of the Code. This will lower the vertical clearance requirements for water areas of 20 acres to 2,000 acres by six inches in most cases; however, this reflects the 1997 Code standards and is consistent with the Commission’s original intent to incorporate the clearance requirements of the Code, with limited exceptions.<sup>5</sup> The fact that “minimum clearance requirements of 32 feet to 35 feet” appears in parentheses in the Original rule indicates that this phrase was used to describe the requirements of Section 7(c) and was not used to independently establish a precise “32 feet to 35 feet requirement.” Section II(a)(i) is renumbered as Section 3(A)(1) in Chapter 910.

b. § 3(A)(2)

In Section 3(A)(2), we add a sentence clarifying that Section 7(b) of Table 232-1 is eliminated for the purposes of Section 8 of Table 232-1.

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<sup>5</sup> The Commission noted in the order adopting Chapter 91 that “the Code is the result of extensive effort and review by experts from various fields and areas. As the utilities are accustomed to working with the complete Code, the Commission will, with certain exceptions, incorporate by reference the provisions of section 232 of the Code . . .” Docket No. 88-97, *Order* at 3.

c. § 3(A)(3)

Section II(a)(ii) of Chapter 91 eliminated the 20 to 200 acre category contained in footnote 18 of Table 232-1. Footnote 18 modifies the clearance requirements in places where over-water obstructions, such as bridges, restrict vessel height. The 1997 Edition of the Code changes footnote 18 slightly by referring the reader to new Table 232-3. In Section 3(A)(3), we include a reference to Table 232-3 in order to properly identify the current location of the 20 to 200 acre category (now (f)(2)).

2. § 3(B) – Existing Communications and Neutral Conductors

Section II(a)(iii) provided an exception for existing communications and neutral conductors. Communications and neutral conductors existing when the rule was originally adopted in August 1988 could be maintained at their then present height until such time as the pole was replaced, removed or reconstructed. We retain this provision as it is possible that some of these lines and poles still exist awaiting replacement. We also add cable television companies to this section. Cable television companies may maintain existing communication conductors and cables on poles existing as of September 1, 2001, until the pole is replaced, removed or reconstructed. This section is renumbered as Section 3(B).

3. § 3(C) – Lesser Requirements Superseded

We make no changes to Section II(a)(iv), except that it is renumbered as Section 3(C). In the interest of safety, the higher requirements of this Rule will continue to supersede any requirements of lesser vertical clearance allowed by the State or the U.S. Army Corps of Engineers, to the extent allowed by law.

D. Sections Eliminated1. Section II(b) of Chapter 91

We eliminate Section II(b) (concerning non-compliant lines) of Chapter 91 as discussed above in III(D).

2. Section III of Chapter 91

We eliminate Section III almost entirely. Section III sets forth the requirement that warning markers or protective wrap be used on non-compliant lines crossing rigging or launching sites until the lines are brought into compliance. Because these lines were required to be in compliance by July 1, 1990, the allowance for the use of warning devices and protective wrap during the two-year grace period is no longer relevant. The Commission's order adopting Chapter 91 confirms that the warning device requirement was established only for this specific category of lines. The Commission stated, "Because the markings would not be in place beyond the two-year

period set out for compliance with the vertical clearance requirements of this rule and provide less protection to the public than higher lines, the Commission will require the marking or insulating of non-complying lines only at areas for rigging or launching sailboats.” Docket No. 88-97, *Order* at 7. Therefore, we eliminate Section III, except for II(L) which now appears in the purpose section 2 of Chapter 910.

3. Section IV of Chapter 91: Reports

We eliminate Section IV of current Chapter 91 entirely. Section IV requires a quarterly report describing the lines raised, reconstructed or removed to meet the requirements of the Rule, the cost of such work and the lines the utility plans to put into compliance during the current quarter. The quarterly reporting requirement was only necessary during the two-year grace period in order to track the utilities’ progress toward compliance. Since this period has expired, reporting is no longer necessary.

4. Section V of Chapter 91: Legal Effect

We eliminate Section V entirely. Section V describes the legal effect of the two-year grace period. Because this grace period has expired a description of the legal effect of the period is no longer necessary.

E. Section 4: Delegation of Authority

We retain part of current Section VII, Delegation of Authority, under “Delegation of Authority” and move part to create a new “Waiver or Exemption” section. Section VII is renumbered Section 4. “Delegation of Authority” retains the statement delegating authority to the Director of the Technical Analysis Division to determine whether a line at a particular location is regulated by Chapter 910 and complies with the rule.

We remove the sentences describing the Director’s ability to grant a waiver from the “Delegation of Authority” section. New Section 6, “Waiver or Exemption,” uses our current, standard waiver language used in other Commission rules.

F. Section 5: Civil Violation for Failure to Comply

We retain current Section VI, Civil Violation for Failure to Comply, and renumber it as Section 5.

G. Commission Appeal

We eliminate Section VIII. Reconsideration of the Director’s decision may be requested under Chapter 110, § 1004 of the Commission’s Rules of Practice and Procedure within 20 days of the date of the decision by filing a petition with the

Commission stating the grounds for reconsideration, rendering Section VIII unnecessary.

H. Waiver or Exemption

As explained previously, we move the waiver provision from former Section VII, Delegation of Authority, to new Section 7 and update the provision with our current waiver language used in all of the Commission's rules.

Accordingly, we

O R D E R

1. That the Administrative Director send Notice of the adoption of these amendments to the following:

1. All transmission and distribution utilities in the State;
2. All telephone utilities in the State;
3. All cable television companies in the State;
4. All people who have filed with the Commission within the past year a written request of Notice of Rulemaking;

2. That the Administrative Director send a copy of this Order and amended rule to the Secretary of State for publication in accordance with 5 M.R.S.A. § 8053 and to the Executive Director of the Legislative Council, State House Station #115, Augusta, Maine 04333 (20 copies)

Dated at Augusta, Maine, this 10th day of September, 2001.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Nugent  
   Diamond

## NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.